STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 24, 2003
v	No. 236077 Wayne Circuit Court
CHAVIS DOOLEY, Defendant-Appellee.	LC No. 01-004845-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v	No. 236129 Wayne Circuit Court
EUGENE TINSLEY, Defendant-Appellee.	LC No. 01-004845-02

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

In this consolidated appeal, the prosecution appeals as of right orders granting defendants' motions on speedy trial grounds to dismiss charges of breaking and entering a vehicle with damage to the vehicle, MCL 750.356a. Defendant Dooley was also subject to being sentenced as a fourth habitual offender, MCL 769.12. We reverse and remand for reinstatement of the charges.

On appeal, the prosecution argues that the trial court erred in dismissing the charges against defendants on the basis that their right to a speedy trial had been violated.[1] We agree.

[1] We note that the trial court did in fact state that it was granting defendant Dooley's motion to dismiss on speedy trial grounds, but the case the trial court relied on, *People v Adams*, 232 Mich App 128; 591 NW2d 44 (1998), involved an alleged prearrest delay due process violation which was part of defendant Tinsley's motion to dismiss. Because both issues involve constitutional (continued…)

This Court reviews issues that implicate a defendant's right to a speedy trial as follows:

> Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. A trial court's factual findings are reviewed under the clearly erroneous standard. Constitutional questions of law are reviewed de novo. To determine whether a defendant has been denied his right to a speedy trial, an appellate court considers (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant. A delay of more than eighteen months is presumed to be prejudicial; the prosecution bears the burden of proving lack of prejudice to the defendant. The establishment of a presumptively prejudicial delay "triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." [*People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997) (citations omitted).]

A criminal defendant has a constitutional and statutory right to a speedy trial. US Const, Am VI; Const 1963, art 1 § 20; MCL 768.1. This right attaches at the time a defendant is formally accused or arrested. *Dillingham v United States*, 423 US 64, 65; 96 S Ct 303; 46 L Ed 2d 205 (1975). Defendants were originally arrested on October 19, 1999, immediately released on bond, and a warrant was issued on November 10, 1999. However, defendant Tinsley was not rearrested until March 19, 2001 and defendant Dooley was not rearrested until March 29, 2001. The prosecution could offer no explanation for this seventeen-month delay and, on appeal, only speculates that that the delay was due to lack of manpower and the low degree of seriousness of the offense. Unexplained delays are generally attributed to the prosecution**.** *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985).

Defendants were bound over for trial, and defendant Dooley filed his motion to dismiss on speedy trial grounds on June 8, 2001. The delay between defendants' rearrest and the filing of their motions to dismiss is attributable to the prosecution. Approximately one month of this time was due to two adjournments requested by the prosecution. However, delay due to docket congestion, while attributed to the prosecution, is a neutral factor to be assigned minimal weight. *People v Simpson*, 207 Mich App 560, 563-564; 526 NW2d 33 (1994). Defendants' motions to dismiss were granted on July 6, 2001. Delays caused by the adjudication of defense motions are attributable to the defendant. *Gilmore, supra* at 461. Accordingly, because the delay attributable to the prosecution in both cases was at least eighteen months, not counting any delays caused by docket congestion, it is presumed prejudicial and the burden is on the prosecution to prove lack of prejudice to defendants. *Id.* at 460.

The third factor we must consider is assertion of the right. Defendant Dooley asserted his right to a speedy trial in his motion to dismiss, less than two months after he was bound over for trial and less than three months after he was rearrested, and thereby preserved the issue for appellate review. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Under the

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questions and the failure to raise either issue does not waive review, *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999), we will address both arguments.

circumstances, we believe that defendant Dooley timely asserted his right to a speedy trial, and reject the prosecution's contention that he purposefully delayed asserting his right to a speedy trial until after the eighteen-month period had passed, Particularly because seventeen and one-half months had already passed by the time defendant Dooley was rearrested.

Defendant Tinsley admits that he never asserted his right to a speedy trial. His motion to dismiss was based on insufficient evidence and prearrest delay. Although failure to assert the right does not waive review of the issue for defendant Tinsley, it weighs heavily against finding that his right to a speedy trial was violated. *People v Metzler*, 193 Mich App 541, 546; 484 NW2d 695 (1992).

Lastly, we must consider whether defendants were prejudiced as a result of the delay. There are two types of prejudice: prejudice to the person and prejudice to the defense. A defendant can establish prejudice either by demonstrating "(1) prejudice to his person in the form of oppressive pretrial incarceration and excessive anxiety and concern," or "(2) prejudice to his defense caused by loss of evidence or unavailability of key witnesses." *People v Missouri*, 100 Mich App 310, 323; 299 NW2d 346 (1980). "In considering the prejudice to the defendant, the most serious inquiry is whether the delay has impaired the defendant's defense." *Simpson, supra* at 564.

Neither defendant was prejudiced by pretrial incarceration because both defendants obtained bond immediately after their arrests. Although defendant Dooley further argued that remaining under the cloud of unadjudicated charges prejudiced him, he did not elaborate as to how specifically he was prejudiced. General allegations of prejudice and mere assertions that the delay caused anxiety are insufficient to establish a violation of the right to a speedy trial. *Gilmore, supra* at 462.

Nor do we find that defendants' ability to prepare a defense has been impaired. There is no evidence in the record that the unidentified witnesses to which defendants refer are actually unable to be found or would have provided relevant information beneficial to their defense.[2] Similarly, defendants' ability to use the physical evidence has not been impaired, and defendants proffer no such argument.

Thus, after balancing the four factors, we conclude that the prosecution has overcome the presumption of prejudice because defendants suffered no actual prejudice as a result of the delay, and, therefore, defendants were not denied the right to a speedy trial. Accordingly, the trial court improperly granted defendants' motions to dismiss on speedy trial grounds.

We also hold that defendants' due process rights were not violated as a result of the prearrest delay. Before dismissal may be granted because of prearrest delay, the defendant must prove that there was actual and substantial prejudice to his right to a fair trial, then the burden switches to the prosecution to persuade the court that the reason for the delay is sufficient to justify the resulting prejudice. *People v Adams*, 232 Mich App 128, 133-134; 591 NW2d 44

[2] Defendant Dooley asserted in his Motion to Dismiss that the witnesses "could shed light on who, if anyone, was involved in any possession of drugs." This testimony is irrelevant to defendants' charged offense.

(1998). To be substantial, the prejudice to the defendant must meaningfully impair his ability to defend against the charges against him in such a manner that the outcome of the proceedings will likely be affected. *Id*. at 134-135.

We find that defendant Dooley has suffered no actual prejudice. The testimony of defendant Dooley's "lost" witnesses was irrelevant to the charged offense, as it related to drug possession. Defendant Tinsley contended below that he had "no way to find all the witnesses." However, defendant Tinsley did not indicate what efforts were made on his part to find the res gestae witnesses, whether he enlisted the assistance of the prosecution,[3] nor did he explain why these efforts would be fruitless. Additionally, defendant Tinsley asserted below that he could no longer remember the events, yet he asserts on appeal that these "lost" witnesses could corroborate his testimony. He offers no explanation for these contradictory statements, nor does he delineate the witnesses' testimony.

This Court noted in *Adams, supra* at 136, that the death of a witness is insufficient to prove prejudice, unless the defendant can show that the witness' testimony was exculpatory and could not be obtained through any other means. Therefore, given defendant Tinsley's cursory allegations, we find that he failed to establish actual and substantial prejudice. Accordingly, defendants have not carried their burden and the prosecution does not need to offer a reason for the delay. *Id*. at 139.

The prosecution also argues that the trial court erred in concluding that the district court abused its discretion in binding over defendants. Again, we agree. This Court reviews de novo a circuit court's decision to affirm or reverse the decision of the magistrate. *People v Mason*, 247 Mich App 64, 71; 634 NW2d 382 (2001).

A magistrate has a duty to bind over a defendant for trial if it appears that a felony has been committed and there is probable cause to believe that the defendant committed that felony. MCL 766.13. "The district court's inquiry is not limited to whether the prosecution has presented sufficient evidence on each element of . . . the offense, but extends to whether probable cause exists after an examination of the entire matter based on legally admissible evidence." *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000). Probable cause exists when there is a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person to believe that the accused is guilty of the offense charged. *People v Hudson*, 241 Mich App 268, 279; 615 NW2d 784 (2000).

A reviewing magistrate should carefully examine the charge to ensure that sufficient evidence exists for each element of the crime. *People v Denio*, 454 Mich 691, 712 n 22; 564 NW2d 13 (1997); *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). Evidence may be direct or circumstantial. *Hudson, supra* at 278. "While positive proof of guilt is not required, there must be evidence on each element of the crime charged or evidence from which those elements may be inferred." *People v Doss*, 406 Mich 90, 101; 276 NW2d 9 (1979).

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[3] The prosecution is required by statute to assist the defendant, upon request, in locating res gestae witnesses. MCL 767.40a(5).

The elements of the crime of larceny from a motor vehicle are (1) a breaking or entering in a motor vehicle, (2) a breaking, tearing, cutting, or otherwise damaging of the motor vehicle in so breaking or entering, and (3) the specific intent, at the time of the breaking or entering, of stealing or unlawfully removing from the motor vehicle any goods, chattels or property regardless of the property. MCL 750.356a.

After our review of the evidence submitted at the preliminary examination, we conclude that the prosecution presented sufficient evidence to support a finding of probable cause that defendant Tinsley committed the charged offense. Specifically, the arresting police officer testified that defendant Tinsley approached the vehicle, busted the window, and reached inside, while a third party was removing the lug nuts from the vehicle's tires. Additionally, the tools that were seized as evidence from the van supported a reasonable inference that defendants intended to commit a larceny.

With respect to defendant Dooley, because he was charged as an aider and abettor, MCL 767.39, the prosecutor had to show

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [*People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).]

We believe there was sufficient evidence to find probable cause existed that defendant Dooley aided and abetted in the crime. He was observed driving the red van to the scene. In addition, the arresting police officer testified that defendant Dooley "looked around in all directions." Although defendant Dooley objected to the police officer's characterization of him as a "lookout," a reasonable inference could be made that he acted as a lookout since he remained in the immediate area while (1) defendant Tinsley broke the window and reached inside, and (2) the third party was removing the tire. Further, when the police officer's partners arrived on the scene, defendant Dooley failed to separate himself from the ongoing crime by alerting the police that he was an innocent bystander, but instead, aligned himself with defendant Tinsley and the third party by jumping in the same vehicle that the three perpetrators were seen in when they arrived on the campus.

Although defendants argue that because the crime was aborted before completion, they should have been charged with attempted breaking and entering, this Court has held that MCL 750.356a does not require a completed larceny in order to sustain a conviction. *People v Nichols*, 69 Mich App 357, 359-360; 244 NW2d 335 (1976). Further, defendants' intent to permanently deprive the owner of her property could be inferred from the circumstances. *People v Chronister*, 44 Mich App 478, 481; 205 NW2d 238 (1973).

Defendants emphasized, and the trial court agreed, that the prosecution failed to present sufficient evidence that the owner did not give permission for defendants to break the vehicle's

window and remove the front tire. We disagree. Contrary to defendants' assertion that the complainant had to testify at the preliminary examination to establish ownership, our Supreme Court has held that it is not necessary for the prosecution to establish the ownership of the automobile as long as the prosecution establishes that the property belonged to someone other than the defendant. *People v Hadesman*, 304 Mich 481, 482; 8 NW2d 145 (1943). The prosecution submitted sufficient evidence, or alternatively, sufficient evidence to support a reasonable inference, that defendants were not the owners of the vehicle.

Specifically, the arresting officer testified that he spoke with the owner of the vehicle, which we find was legally admissible evidence to establish that defendants were not the owners because it was not hearsay. Hearsay is defined as an unsworn, out-of-court statement offered to establish the truth of its contents and cannot be admitted as substantive evidence except as provided in the Michigan Rules of Evidence. MRE 801-802. Here, the police officer provided no substantive details of his conversation with the owner. We conclude that the testimony was solicited to establish an acknowledgement of a conversation with a person, other than defendants, who had the status of owner, and thus, does not constitute hearsay.

Regardless, even if the officer's testimony was hearsay, there was testimony that defendants fled, which created a reasonable inference that defendants were not the owners of the vehicle. Had they a legitimate reason to break the window and remove the tire, presumably, they would have explained this to the police. Consequently, there was evidence to support a reasonable inference that defendants were not the owners of the vehicle. Accordingly, we conclude that there was sufficient evidence to support a finding of probable cause, and the trial court erred in concluding that the district court abused its discretion in binding over defendants.

Reversed and remanded for reinstatement of the charges and further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Bill Schuette